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SERVICE DATE - APRIL 9, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB- 290 (Sub-No. 247X)

NORFOLK SOUTHERN RAILWAY COMPANY--ABANDONMENT EXEMPTION--  
IN MECKLENBURG COUNTY, NC

Decided: April 7, 2004

By petition filed on December 23, 2003, Norfolk Southern Railway Company (NSR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a segment at the end of its line of railroad known as the old R-Line. The 1.95-mile segment extends from Milepost old R-3.00 to Milepost old R-4.95, in Charlotte, Mecklenburg County, NC. NSR also seeks an exemption from the offer of financial assistance (OFA) requirements of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905. Notice of the filing was served and published in the Federal Register on January 12, 2004 (69 FR 1781). The exemptions will be granted, subject to environmental and standard employee protective conditions.

BACKGROUND

According to NSR, no traffic has moved on the portion of the line between Milepost old R-3.00 and Milepost old R-3.80 for many years. The carrier indicates that it will reclassify the remaining portion between Milepost old R-3.80 and Milepost old R-4.95 as industrial track to enable it to continue serving C&T Refinery (C&T), the only active rail customer on the line.

NSR states that abandonment will facilitate plans by the City of Charlotte, NC (City), to use the right-of-way for public purposes. According to NSR, the City plans to construct a light rail passenger system over the right-of-way and other contiguous property. NSR states that it sold the right-of-way to the City on December 11, 2003, and retained a continuing easement for the track to be reclassified. NSR and the City have reached an agreement that preserves NSR's right to serve C&T and any potential new customer that could locate on the reclassified track. NSR has advised C&T of its plan to abandon and reclassify the track. No one has filed in opposition to the proposed abandonment.<sup>1</sup>

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<sup>1</sup> By decision served January 29, 2004, the Board granted a request by Cargill, Inc. (Cargill), which owns and operates C&T, for an extension until February 17, 2004, to file a reply to the exemption petition. Cargill indicated that it was negotiating with NSR about future service (continued...)

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving NSR of the costs of maintaining and operating the unused portion of the subject line while preserving service to the only shipper on the line [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transactions is not necessary to protect shippers from the abuse of market power. C&T, the only active shipper on the line, will continue to receive rail service over the reclassified track. To ensure that C&T is informed of the Board's action, NSR will be required to serve a copy of this decision on C&T within 5 days of the service date of this decision and certify to the Board that it has done so. Given the market power finding, the Board need not determine whether the proposed abandonment is limited in scope.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), will be imposed.

NSR has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed abandonment. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment.

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<sup>1</sup>(...continued)

for C&T and needed the additional time to conclude the negotiations. Cargill made no further filings.

SEA served an environmental assessment (EA) on February 20, 2004, requesting comments by March 22, 2004. In the EA, SEA recommended that two conditions be imposed on any decision granting abandonment authority.

SEA stated that the U.S. Fish and Wildlife Service (FWS) had advised that the Bald Eagle and four plants (Georgia Aster, Schweinitz's Sunflower, Smooth Coneflower and Michaux Sumac), which are federally listed as threatened species, are located in Mecklenburg County. Therefore, SEA recommended that NSR consult with FWS to determine if any of these species are known to occur within the proximity of the right-of-way, and if the species would be adversely affected by proposed salvage activities.

SEA also stated that the National Geodetic Survey (NGS) had identified two geodetic station markers (FA 2542 and FA 4474) that may be affected by the proposed abandonment. Therefore, SEA recommended that NSR notify NGS 90 days prior to commencement of any planned activities that would disturb or destroy these markers to plan for their relocation.

The U.S. Department of Agriculture, Natural Resources Conservation Service filed a letter in response to the EA, stating that it had no comments on the EA at that time. No other comments to the EA were filed by the March 22, 2004 due date. Therefore, the conditions recommended by SEA will be imposed. Based on SEA's recommendation, the Board concludes that the proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As previously noted, NSR has requested that the abandonment be exempted from the OFA requirements of 49 U.S.C. 10904 and the public use requirements of 49 U.S.C. 10905. Exemptions from these requirements have been granted from time to time, when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service.<sup>2</sup> Here, NSR has transferred the right-of-way to the City for a valid public purpose, and the sole shipper on the line will continue to have access to rail service from NSR. Imposition of OFA procedures could delay or even thwart City's plans to construct a light rail passenger system over the right-of-way. Likewise, there is no need for a public use condition because a public use for the right-of-way has already been established between NSR and the City.

The evidence of record establishes that the proposed exemptions from 49 U.S.C. 10904-05 meet the criteria of 49 U.S.C. 10502. Applying OFA or public use requirements in this

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<sup>2</sup> See, e.g., Central Michigan Railway Company—Abandonment Exemption—In Saginaw County, MI, STB Docker No. AB-308 (Sub-No. 3X) (STB served Oct. 31, 2003); Central Kansas Railway, L.L.C—Abandonment Exemption—In Sedgwick County, KS, STB Docket No. AB-406 (Sub-No. 14X) (STB served Apr. 10, 2001); Norfolk and W. Ry. Co.—Aban. Exem.—Cinn., Hamilton County, OH, 3 S.T.B 110 (1998).

instance is not necessary to carry out the rail transportation policy. Allowing the abandonment exemption to become effective expeditiously, without first being subject to these requirements, would minimize the need for Federal regulatory control over the rail transportation system, expedite the regulatory decision, and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. It has already been determined that regulation is not necessary to protect shippers from an abuse of market power. Accordingly, an exemption from the OFA and public use requirements of 49 U.S.C. 10904-05 will be granted.

There is no need to provide the opportunity for the filing of trail use/rail banking requests. Trail use/rail banking is voluntary and can be implemented only if an abandoning railroad agrees to negotiate an agreement. See section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d). Here, NSR has already transferred the right-of-way to the City and has stated that it will not negotiate with any other potential trail user.

Finally, NSR has requested that the decision granting the abandonment be made effective on an expedited basis to allow the City to begin its use of the right-of-way for public purposes. Under the circumstances presented here, NSR's request for expedited handling is appropriate and will be granted. To accommodate that request, the exemption will be made effective in 15 days, rather than the customary 30 days.

It is ordered:

1. Under 49 U.S.C. 10502, the Board exempts from the prior approval requirements of 49 U.S.C. 10903-05 the abandonment of the above-described line, subject to the employee protective conditions in Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that NSR: (1) consult with FWS to determine whether the Bald Eagle, Georgia Aster, Schweinitz's Sunflower, Smooth Coneflower and Michaux Sumac are known to occur within the proximity of the right-of-way and if any of these species would be adversely affected by proposed salvage activities; and (2) notify NGS 90 days prior to commencement of any planned activities that would disturb or destroy the two geodetic station markers to plan for their relocation.

2. NSR must serve a copy of this decision on C&T within 5 days of the service date and certify to us that it has done so.

3. This exemption will be effective on April 24, 2004. Petitions to stay must be filed by April 19, 2004, and petitions to reopen must be filed by April 29, 2004.

4. Pursuant to the provisions of 49 CFR 1152.29(e)(2), NSR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by NSR's filing of a notice of consummation by April 9, 2005 and there are no legal or regulatory barriers to consummation,

the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier.

By the Board, Chairman Nober.

Vernon A. Williams

Secretary